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NO. 86-2061

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITIZENS FOR BETTER EDUCATION,
A TEXAS NON-PROFIT CORPORATION, et al.,
Appellants

v.

GOOSE CREEK CONSOLIDATED INDEPENDENT
SCHOOL DISTRICT AND THE BOARD OF
TRUSTEES OF GOOSE CREEK CONSOLIDATED
INDEPENDENT SCHOOL DISTRICT,
Appellees

**ON APPEAL FROM THE
SUPREME COURT OF TEXAS**

MOTION IN THE ALTERNATIVE TO DISMISS OR TO AFFIRM

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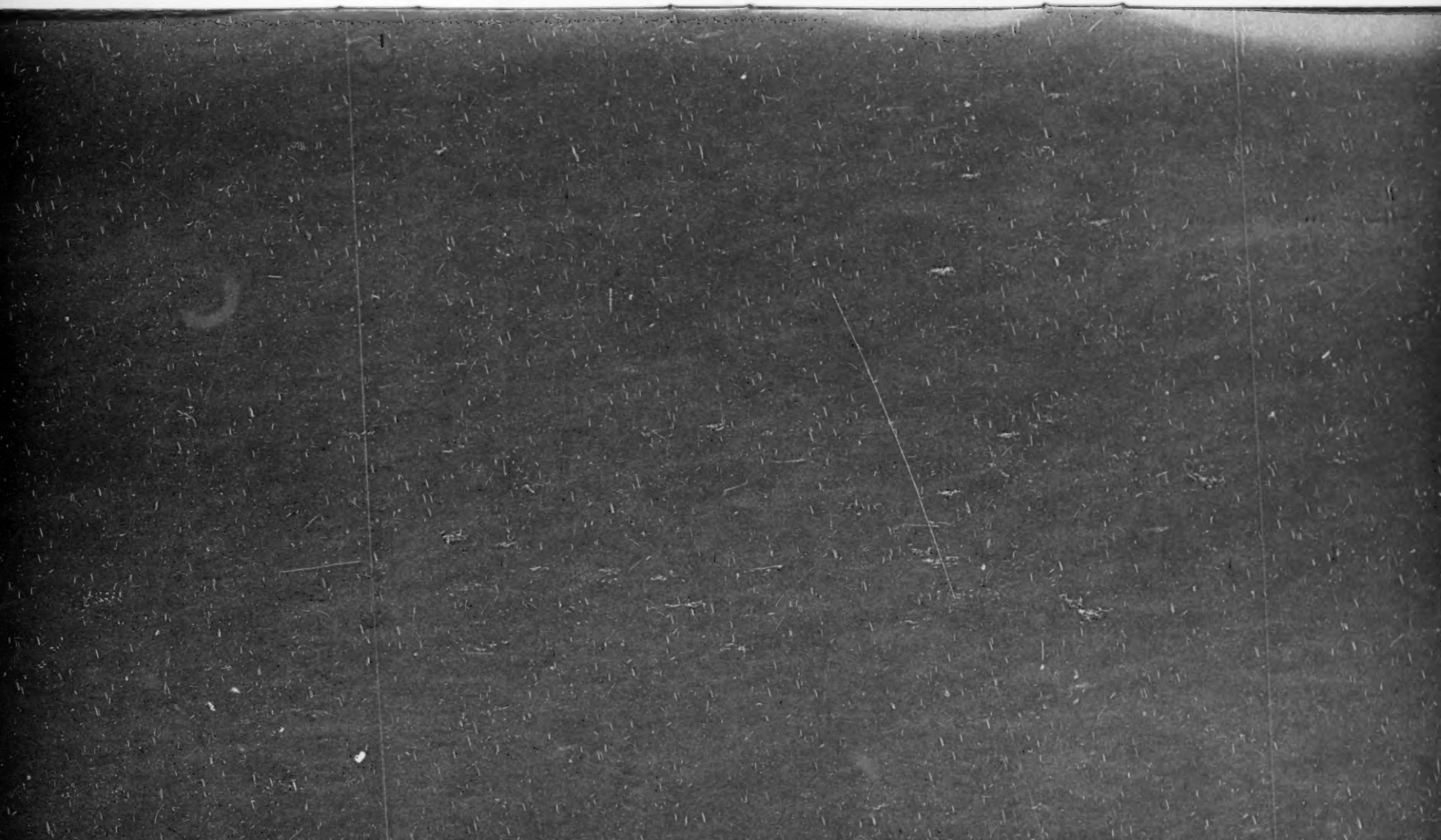

SUBJECT INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	3
CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	3
ARGUMENT	6
APPELLANTS DO NOT RAISE A SUBSTANTIAL FEDERAL QUESTION	6
I. THE COURTS BELOW CORRECTLY HELD AS A MATTER OF LAW THAT A SCHOOL BOARD HAS THE AUTHORITY TO IMPLEMENT A RACE-CONSCIOUS REZONING PLAN IN THE ABSENCE OF PRIOR *DE JURE* OR *DE FACTO* SEGREGATION.	6
II. THE COURTS BELOW CORRECTLY HELD IN APPLYING A RATIONAL BASIS STANDARD OF REVIEW TO APPELLANTS' CLAIM THAT THE RACE-CONSCIOUS REZONING PLAN DID NOT VIOLATE THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.	10
CONCLUSION	11
CERTIFICATE OF SERVICE	13

LIST OF AUTHORITIES

CASES	Page
Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686 (1954)	7, 10, 11
Citizens for Better Education v. Goose Creek Consolidated Independent School District, 719 S.W.2d 350 (Tex. App. —Houston [1st Dist.] 1986, writ ref'd n.r.e.)	7, 10, 11
Fullilove v. Klutznick, 448 U.S. 448, 100 S. Ct. 2758 (1980)	7
McDaniel v. Barresi, 402 U.S. 39, 91 S. Ct. 1287 (1971)	9
North Carolina State Board of Education v. Swann, 402 U.S. 43, 91 S. Ct. 1284 (1971)	7, 8, 9
Regents of the University of California v. Bakke, 438 U.S. 265, 98 S. Ct. 2733 (1978)	9, 10
San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S. Ct. 1278 (1973)	11
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S. Ct. 1287 (1971)	7
Wygant v. Jackson Bd. of Educ., 476 U.S. ____, 106 S. Ct. 1842 (1986)	6, 8, 9, 10

UNITED STATES CONSTITUTION	
Fourteenth Amendment	10

UNITED STATES STATUTES	
28 U.S.C. § 1257(2)	3

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MAY IT PLEASE THE COURT:

Appellees, GOOSE CREEK CONSOLIDATED INDEPENDENT SCHOOL DISTRICT and the BOARD OF TRUSTEES OF GOOSE CREEK CONSOLIDATED

INDEPENDENT SCHOOL DISTRICT (hereinafter "GCCISD"), Respondents in Cause No. C-6032 in the Supreme Court of Texas, Appellees in Cause No. 01-85-0837-CV in the Court of Appeals for the First Supreme Judicial District of Texas at Houston, Texas, and Defendants in Cause No. 85-32372 in the 125th Judicial District Court of Harris County, Texas, respectively submit this motion in the alternative to dismiss or to affirm in response to Appellants' jurisdictional statement which was filed for the Court's consideration on June 23, 1987, and move that the appeal taken herein be dismissed on the ground that said appeal does not present a substantial federal question.

OPINIONS BELOW

This case involves the rezoning of school district attendance zones. This is an appeal from a decision of the Supreme Court of Texas which refused discretionary review of this case on March 25, 1987, and the opinion of the Court of Appeals for the First Supreme Judicial District of Texas entered August 28, 1986, rejecting Appellants' contention that a school board does not have the authority to implement a race-conscious rezoning plan in the absence of prior *de jure* or *de facto* segregation. The opinion of the Court of Appeals for the First Supreme Judicial District of Texas correctly states the nature and results of the suit and is contained in Appendix D of Appellants' jurisdictional statement. This Court of Appeals' decision was subsequently upheld by the Supreme Court of Texas which entered an order on March 25, 1987, refusing discretionary review of the Court of Appeals' decision and finding the decision contained no reversible error.

Appellees respectfully pray that the Court deny jurisdiction on appeal and uphold the decision of the Supreme Court of Texas entered on March 25, 1987.

JURISDICTION

Appellants have not met the jurisdictional requisites to bring this appeal as contemplated by 28 U.S.C. § 1257 (2) in that Appellants failed to raise a substantial federal question.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent constitutional and statutory provisions are set forth in the Appellants' jurisdictional statement.

STATEMENT OF THE CASE

The Appellants originally brought this action in the state District Court in Harris County, Texas, to enjoin the implementation of a rezoning of the school attendance areas of the Ross S. Sterling High School and the Robert E. Lee High School, the only two high schools within the GCCISD.

Throughout previous years, the GCCISD has had two high schools, Ross S. Sterling (hereinafter "Sterling") and Robert E. Lee (hereinafter "Lee"), which were similar in size, achievement and test scores, socioeconomic makeup, and ethnic and racial balance. In 1980, Sterling had 2,259 students and Lee had 2,190 students.

In the early 1980's however, there began to be a change in enrollment patterns, ethnic composition, test scores, numbers of students on free or reduced lunch, and numbers of college bound students. The projections

showed that Lee was going to remain about the same size with an increasing minority population, and Sterling was going to grow substantially with a relatively constant ethnic breakdown. These trends were of concern because of the possible future consequences in terms of building utilization, ethnic makeup, achievement and the possible elimination of college bound courses because too few students on a campus would request them.

The Board asked the administration to develop data concerning these various factors and possible ways to better balance the enrollment of the two schools. Over the 1984-1985 school year, many discussions were had and a great deal of study was done concerning this issue. Two public hearings were held concerning the matter, and the Board received input from citizens at other times.

The Appellants argued that the GCCISD reacted to the fact that a number of postcards were sent to the Board of Trustees regarding these problems during the summer of 1984. However, the testimony is clear that these problems were of concern to the Board for some time prior to that.

On February 11, 1985, the Board passed a motion to change the boundaries and attendance zones of Sterling and Lee High Schools, in what has come to be known as the "pocket zone" plan.

The plans were studied with the idea of minimizing cost and disruption. The plan chosen was the least disruptive in that it moved the fewest students and had the lowest transportation costs. It was the most efficient in terms of transportation. The plan was not seen as having any adverse effect on the educational offerings or program. The majority of those riding a bus to go to a different

school after implementation of the plan would have ridden a bus anyway.

All witnesses who discussed the issue agreed that the provision of an ethnically and racially integrated education is very important for students and their education. Even the President of the Appellants' association, Tom Oliver, agreed that the provision of an integrated education is a worthwhile goal. He simply disagreed with the Board's timing of its action. When questioned about the problem of possible ethnic imbalance in schools, Mr. Oliver could not say when he might choose to address the problem.

Appellants are correct that there has been no finding of *de jure* segregation within the GCCISD as it pertains to Hispanics and that the GCCISD is a unitary school district. However, it was precisely the concern over a trend toward *de facto* segregation of Hispanic pupils which was a prime motivator of the Board's action to rezone.

The Appellants presented several witnesses at trial who testified concerning their alleged objections to the plan. Much was made by these witnesses of their alleged inability to remain involved in their children's schooling. Supposedly, this rezoning now prevents them from attending their children's extracirricular activities. No real reasoning was given by these witnesses as to why such problems would occur. Nor did they say their children would be absolutely foreclosed from any participation. Lee High and Sterling High are 3.6 miles apart, and the driving time is 10 minutes. The only student who testified, Cobie Simpson, said that it did not matter which school she attended.

Mr. Curtis Herring of the GCCISD and Mr. Robert Howell of the Texas Education Agency (TEA), testified that the action taken by the Board was a rezoning of boundaries and not a transfer of students, and the trial court so found.

Two patrons of the GCCISD, Mr. Jere Johnson and Mr. Manuel Escontrias, testified that they supported the Board's action.

ARGUMENT

APPELLANTS DO NOT RAISE A SUBSTANTIAL FEDERAL QUESTION

I.

THE COURTS BELOW CORRECTLY HELD AS A MATTER OF LAW THAT A SCHOOL BOARD HAS THE AUTHORITY TO IMPLEMENT A RACE-CONSCIOUS REZONING PLAN IN THE ABSENCE OF PRIOR *DE JURE* OR *DE FACTO* SEGREGATION.

The action of the Courts below in upholding GOOSE CREEK CONSOLIDATED INDEPENDENT SCHOOL DISTRICT's rezoning plan and the action of the Texas Supreme Court in refusing discretionary review of this decision was proper and should be upheld. Appellants argue that a school board has no authority under state and federal law to implement a rezoning plan that considers race as a motivating force behind the plan unless such plan is pursuant to a Court Order where there has been a showing of prior *de jure* or *de facto* segregation. Appellants cite *Wygant v. Jackson Bd. of Educ.*, 476 U.S. ____, 106 S. Ct. 1842 (1986) as holding that a finding of prior discrimination is required

before use of racial classifications is allowed in order to remedy such discrimination. However, the absence of a court finding of segregation does not mean that a school board is prohibited from remedying perceived ethnic imbalances within the school district. As correctly pointed out by the Court of Appeals below, a school district is free to exceed the minimum requirements in order to promote school integration. *Citizens for Better Education v. Goose Creek Consolidated Independent School District,* 719 S.W.2d 350, 352 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.). See *Fullilove v. Klutznick,* 448 U.S. 448, 508, 100 S. Ct. 2758, 2790 (1980).

Traditionally, locally elected school boards and their school administrators are afforded broad discretionary powers in formulating and implementing educational policy. It is unquestioned that the laws of the State of Texas permit local school boards to designate attendance zones for students. Ensuring that each and every student within the district receives the advantages that an integrated school system can provide is certainly within that broad discretionary authority. *Swann v. Charlotte - Mecklenburg Board of Education,* 402 U.S. 1, 16, 91 S. Ct. 1287, 1288-89 (1971); *North Carolina State Board of Education v. Swann,* 402 U.S. 43, 45-46, 91 S. Ct. 1284, 1285-86 (1971).

A school district is required by the United States Constitution to provide an educational experience for all students regardless of such students' racial classifications. *Brown v. Board of Education,* 347 U.S. 483, 74 S. Ct. 686 (1954). Past court decisions have consistently supported school districts in their attempts to remedy any hint of racial imbalance within the schools. Appellees

contend that this rezoning plan was such an attempt at achieving constitutionally mandated integration within the GCCISD.

Appellants' reliance upon *Wygant* is misplaced for that case does not stand for the propositions which Appellants now urge before this Court. The cause of action in *Wygant* focused on a school board's attempt to implement an affirmative action program for its employees. That portion of the *Wygant* opinion to which Appellants refer speaks directly to affirmative action programs in employment, and such language cannot be so broadly interpreted as applying to school student rezoning plans. The Court in *Wygant* stated that ". . . a public employer like the Board must insure that, before it embarks on an *affirmative action program,* it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination." *Wygant,* 106 S. Ct. at 1848 [emphasis added]. The *Wygant* opinion states that evidence of prior discrimination is a prerequisite in taking the remedial steps of implementing an affirmative action plan to overcome such past discrimination in employment practices within a school system. The decision in *Wygant* does not state that a rezoning plan within a school district for student attendance is improper absent a showing of past discrimination. In fact, the *Wygant* court reaffirmed the position that public schools have a clear mandate to eliminate all racial segregation and discrimination in the schools. According to *Wygant,* in order to comply with such a directive, race-conscious remedial action may be necessary. *Wygant,* 106 S. Ct. at 1848, *citing North Carolina State Board of Education v. Swann,* 402 U.S. 43, 91 S. Ct. 1284 (1971).

A school board policy which seeks to achieve ethnically balanced student bodies and facilities within a school district certainly falls within this constitutional command of eliminating all possible racial discrimination and segregation within the schools. As stated, past court decisions have agreed that race may be considered in achieving such racial balance within a school system. *Swann,* 402 U.S. at 43; *McDaniel v. Barresi,* 402 U.S. 39, 91 S. Ct. 1287 (1971).

The *Wygant* case is more analogous to the case of *Regents of the University of California v. Bakke,* 438 U.S. 265, 98 S. Ct. 2733 (1978), than it is to the case now under consideration. In *Bakke,* it was stated that a classification which aids persons perceived as a minority race member at the expense of others is permissible only where there is evidence of past discrimination against such minority groups. *Bakke,* 438 U.S. at 307-308. Similarly, the affirmative action plan discussed in *Wygant* was intended to protect minority employees against lay offs.

Both *Bakke* and *Wygant* involve situations where different racial groups were competing for a limited number of places within a given field. In *Bakke,* the competition centered around enrollment within a medical school class while *Wygant* involved employment within a public school system. In both instances, individuals were being excluded or removed from the system provided by the public entity involved. The cases are distinguishable from the present case because no student is being excluded from the educational process, only directed as to which building within the system such student is to attend.

Appellees urge the Court to adopt the reasoning as stated in the Court of Appeals Opinion of August 28, 1986, where the Court held that, "We are not concerned here with the constitutionality of distributing a limited number of privileges on the basis of race, as was the case in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)." *Citizens for Better Education*, 719 S.W.2d at 352.

The *Wygant* case is distinguishable from the present case under consideration in that the broad language from *Wygant* relied upon by Appellants does not support their claim that Appellees' rezoning plan is unconstitutional. Therefore, Appellants' first contention is without merit.

II.

THE COURTS BELOW CORRECTLY HELD IN APPLYING A RATIONAL BASIS STANDARD OF REVIEW TO APPELLANTS' CLAIM THAT THE RACE-CONSCIOUS REZONING PLAN DID NOT VIOLATE THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Next, Appellants argue that the Courts below employed the wrong standard of review in upholding Appellees' rezoning plan. Specifically, Appellants argue that *Wygant* requires that the rezoning action be measured by the "strict scrutiny" test rather than a "rational basis" standard.

While the Courts below did uphold Appellees' plan of rezoning under the rational basis standard of review, the Court of Appeals considered the plan according to the strict scrutiny test as well. The Court, citing *Brown*

v. Board of Education, 347 U.S. 483, 74 S. Ct. 686 (1954), held that "If strict scrutiny were to apply, however, providing an integrated education has been described as perhaps the most important function of government and satisfies the requirement that the official action further a compelling state interest." *Citizens for Better Education*, 719 S.W.2d at 353. Thus, Appellees' rezoning plan is constitutionally permissible even if subjected to "strict scrutiny" analysis as now urged by Appellants. The Court of Appeals also correctly held that race was used in this case to promote integration and to extend benefits rather than deny them and therefore should only be subject to "rational basis" rather than "strict scrutiny" analysis. *Citizens for Better Education*, 719 S.W.2d at 352, *citing San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278 (1973).

Therefore, Appellants' contention that the Court of Appeals employed the incorrect standard of review in considering Appellees' rezoning plan is without merit.

CONCLUSION

The contentions of Appellants that are raised in their jurisdictional statement fail to raise a substantial federal question. Appellees' motion to dismiss the appeal or in

the alternative to affirm the decision of the state court should be sustained.

Dated: July 17, 1987.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July, 1987, a true and correct copy of the above and foregoing Motion in the Alternative to Dismiss or to Affirm has been forwarded via certified mail, return receipt requested, to the following attorneys of record to-wit:

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